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NASHVILLE, TENNESSEE

January 13, 2004

T.R.A. DOCKET ROOM

<i>IN RE: Enforcement of Interconnection</i>)	Docket No 02-01203 & 02-01204
<i>Agreement between BellSouth</i>)	
<i>Telecommunications, Inc. and ITC^DeltaCom</i>)	
<i>Communications, Inc. and Request for</i>)	
<i>Expedited Proceedings</i>)	
)	
<i>Enforcement of Interconnection Agreement</i>)	
<i>between BellSouth Telecommunications, Inc.</i>)	
<i>and XO Tennessee, Inc. and Request for</i>)	
<i>Expedited Proceedings</i>)	

**RESPONSE OF XO AND ITC^DELTACOM TO BELL SOUTH'S MOTION FOR
SUMMARY JUDGMENT**

ITC^DeltaCom Communications, Inc. ("ITC^DeltaCom") and XO Tennessee, Inc. ("XO") submit the following response to BellSouth's Motion for Summary Judgment.

DISCUSSION

XO and ITC^DeltaCom have, at all times, been willing to comply with audit requests submitted pursuant to and conducted within the parameters set forth by the Federal Communications Commission. Those parameters, which are intended to protect CLECs from precisely the kind of harassment that BellSouth is attempting here, were initially set forth in the Supplemental Order Clarification ("SOC")¹ and were subsequently clarified and expanded upon in the Triennial Review Order ("TRO").² As the TRO makes plain, these are not "suggestions"

¹ Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Docket No. 96-98, Supplemental Order Clarification, FCC 00-183, 15 FCC Rcd 9587 (released June 2, 2000) ("Supplemental Order Clarification.")

² In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, et al., CC Docket No. 01-338, et al., FCC 03-36 (rel. Aug. 21, 2003) ("Triennial Review Order" or "TRO").

or “recommended guidelines,” but “basic principles regarding carriers’ rights to take and defend against audits.” TRO, paragraph 625. BellSouth’s Motion for Summary Judgment discusses only the SOC and the parties’ interconnection agreements. BellSouth, for whatever reason, does not even discuss the more recently issued TRO and its impact on these proceedings.

As XO and ITC^DeltaCom pointed out in their Summary Judgment Motion, the TRO requires that all audit requests meet the following requirements:

1. The audit request must be “based upon cause.” TRO at paragraph 622.
2. The audit rights granted under the SOC “only addressed EEL conversions.” TRO at paragraph 623.
3. The auditors must conduct their evaluation “in accordance with the standards established by the American Institute for Certified Public Accountants (AICPA).” TRO at paragraph 626. Moreover, the auditors must meet AICPA standards for “determining the independence of the auditor.” Id.³

These are “basic principles regarding carriers’ rights to undertake and defend against audits.” TRO at paragraph 625. The agency also said that the “details surrounding the implementation of these audits may be specific to related provisions of interconnection agreements.” Id. In other words, parties are free to agree upon “details” of audit procedures as long as those details are not inconsistent with the “basic principles” established by the FCC.

Both XO and ITC^DeltaCom entered into interconnection agreements, or amendments to interconnection agreements, with BellSouth after the issuance of the SOC but prior to the TRO.

³ There are other audit requirements which are set forth in the FCC’s orders but are not contested by BellSouth. For example, audits may only be conducted once a year; there must be thirty days notice of the audit; copies of the audit requests must be filed at the FCC; and CLECs are not required to keep more records than they would keep “in the normal course of business.” SOC, paragraphs 31 and 32

It is clear from reading the language of the agreements that the parties intended to reflect the audit requirements which are set forth in the SOC.⁴

After the issuance of the SOC, the FCC issued the TRO which, as previously discussed, clarified and expanded upon the audit parameters set forth in the SOC. The TRO left no doubt that those parameters are binding on the parties. *Id.*, at paragraph 626. BellSouth does not dispute the existence of these FCC requirements. The company's entire argument – repeated over and over and over – is that the parties are free to agree, and have agreed, to audit terms and conditions that are inconsistent with those FCC directives. Neither the facts nor the case law support BellSouth's argument. While it is true that parties may freely negotiate agreements which do not include all the requirements set forth in 47 U.S.C. § 251(b) and (c), none of the cases quoted by BellSouth holds that parties are free to ignore an FCC order, such as the TRO, which purports to be binding on all carriers. For example, the FCC prohibits an ILEC from demanding more than one audit per year. If no such limitation were contained in an interconnection agreement, would BellSouth contend that it can conduct as many audits as it pleases? Similarly, the FCC states that the ILEC must give the CLEC thirty days notice of the

⁴ For example, both agreements include Sections entitled "Special Access Service Conversions." The audit provisions relied upon by BellSouth are included in those sections, plainly indicating that the audits only apply to "Special Access Service Conversions" and not to new EELs. BellSouth's Motion for Summary Judgment describes the audit provisions in each agreement (BellSouth brief, at 3-4) but neglects to point out that those provisions are both found in the sections entitled "Special Access Service Conversions." BellSouth also attached copies of the agreements to the company's brief. The attachment from the ITC^DeltaCom agreement conveniently omits the page with the title "Special Access Service Conversions."

Similarly BellSouth's brief relies heavily on two sentences in the SOC which states, "As the parties indicate, in many cases, their interconnection agreements already contain audits rights. We do not believe that we should restrict parties from relying on these [interconnection] agreements." SOC at paragraph 32. Again, BellSouth conveniently neglects to include the sentence which immediately precedes the quoted passage. After setting forth various, mandatory requirements for an audit of converted EELs, the FCC explains that it does not intend to go into detail about other audit issues. The FCC wrote, "We will not require specifically that incumbent LECs and requesting carriers follow the other auditing guidelines contained in the February 28, 2000 Joint Letter." Emphasis added. Thus, read in context, the language quoted by BellSouth means that the parties are free to address "other" audit issues as long as those details are consistent with the FCC's requirements.

audit request and must file a copy of the request with the FCC. Here again, would BellSouth contend that it is exempt from these requirements unless they are repeated in the parties' interconnection agreement?⁵

To the extent the FCC requirements do apply to this case, BellSouth argues in the alternative that the company has complied with at least two of those requirements. First, BellSouth contends that they have, in fact, told the CLECs the basis of BellSouth's "concern" regarding the CLECs' use of EELs. Those concerns, according to the Motion for Summary Judgment, are based on "records gathered" by BellSouth which are not mentioned in BellSouth's Petitions and have not been introduced into the record of these proceedings. If BellSouth wishes to present such records to the TRA, the CLECs will respond appropriately and the Hearing Officer can determine whether BellSouth has demonstrated sufficient "cause," as required by the TRO, for an audit.

Second, BellSouth argues that their chosen auditor is "independent" based on the meaning of "independent" in Webster's Dictionary. Again, BellSouth ignores the TRO which spells out that the term "independent" should be interpreted and applied in accordance with AICPA standards. TRO at paragraph 626. BellSouth has yet to make any such showing.

CONCLUSION


The TRO contains at least ten paragraphs, (620-629) which "set forth the basic principles regarding carriers' right to undertake and defend against audits." Paragraph 625. BellSouth's brief does not discuss (or even refer to) a single paragraph in the TRO. As XO and ITC^DeltaCom have pointed out, the TRO addresses every issue raised in this case and resolves each one in favor of the CLECs. BellSouth must abide by those FCC's requirements in order to

⁵ The requirement that copies of audit request be filed with the FCC is included in the XO agreement but not in the ITC^DeltaCom agreement. BellSouth, of course, notified the FCC of both audit requests, as it was required to do.

conduct the requested audits. BellSouth has not done so, and, therefore, BellSouth's Petitions should be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 13 2004, a copy of the foregoing document was serviced on the parties of record, via US mail:

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